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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. ...78-1170

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

against

JAMES MIZELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Attorney General of the State of New York prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit in the case of *James Mizell* v. *Attorney General of the State of New York, and ano,** entered on October 30, 1978.

Respondent's motion pursuant to Rule 41(b) Federal Rules of Appellate Procedure to stay the Court of Appeals' mandate to the District Court for 30 days was granted by the Court of Appeals on November 27, 1978. A second motion for a second thirty day stay of the mandate was, however, denied on or about December 22, 1978 and on January 5, 1979, although respondent had not applied for

* The other party defendant and appellant in the proceedings below was the Warden, Brooklyn House of Detention.

relief as directed by the Court of Appeals,* an order on remand was entered by the United States District Court for the Eastern District of New York vacating the conviction in issue and directing all references to it to be expunged from petitioner's records. On January 15, 1979 judgment on said order was entered.**

Decisions Below

The decision of the Court of Appeals is unreported as yet, and reproduced in Appendix A. The decision of the District Court is reported at 442 F. Supp. 868 and reproduced in Appendix B. The order of the District Court upon remand from the Court of Appeals is reproduced in Appendix C.

Jurisdiction

Jurisdiction of the Court is invoked pursuant to Title 28, United States Code § 1254(1).

Questions Presented

1. Should this Court's holding in *Crist* v. *Bretz,* 437 U.S. 28 (1978) that the federal rule regarding when jeopardy attaches is an integral part of the constitutional guarantee against double jeopardy and permits no less stringent standard in state criminal jury proceedings be retroactively applied to void all prior state court judgments of conviction in which the state courts, in the absence of a clear and explicit ruling of this Court to the contrary, permitted application of a less stringent rule regarding when jeopardy attaches?

2. Is the manifest necessity of the discharge of a sworn jury demonstrated where said discharge occurred in the furtherance of state policy to clear calendar congestion and to provide a speedy trial to other accuseds, and no negligence or misconduct of the prosecutor is demonstrated by the record?

3. Where the respondent was in state custody at the time of his petition but is no longer in state custody at the time a judgment in his favor is to be rendered, may the lower federal courts properly order the expungement of the conviction from state records when the persons responsible for such records are not parties to the habeas proceeding, the habeas petition did not ask for such relief, and such an order has the effect of mandamus?

* Appendix A, pg. 12a.

** An application to vacate said judgment and/or stay enforcement pending certiorari is scheduled in the United States District Court, Eastern District of New York on January 23, 1979.

Statement

A. Proceedings in State Courts

Respondent was arrested on November 5, 1970 and charged, along with one James Love, with the crimes of robbery in the first degree, assault in the first degree, possession of a weapon as a felony and petit larceny, by indictment 5031/70 (Kings County, New York).

On Wednesday, March 24, 1971 a jury was impaneled and sworn. The trial was to begin the following day, Thursday, March 25. However, a *Wade* (*United States* v. *Wade,* 388 U.S. 218 [1967]) hearing was requested by respondent and his co-defendant at that time. At the close of the State's case on the *Wade* hearing, counsel for the co-defendant Love requested a continuance so as to be able to present a witness he had incorrectly assumed would be called by the prosecution. The Court asked whether Love's counsel was also moving for the withdrawal of a juror and Love's counsel replied in the negative, whereupon the Court denied Love's motion.

Counsel for respondent rested on the State's case. The trial court ruled that the in-court identification of defendants was admissible.

Thereafter, on the same afternoon, the prosecutor was informed by a detective that two witnesses who had been personally served with subpoenas, and who promised to be present to testify at the trial, were unavailable to testify, one because of a death in the family, and the other, who had been seen leaving his house that morning with subpoena in hand, for no apparent reason. The prosecutor, who had instituted a search for the second witness, moved for a continuance:

". . . Because of these facts and circumstances the people would ask for a continuance in this trial.

The Court: Until when?

Mr. Turner: Monday, your Honor.

The Court: What am I going to do with that jury, Mr. Turner?

Mr. Turner: Your Honor, since the jurors are serving their first week this week, they would be serving next week as well. I don't think it would be a hardship on those jurors because we wouldn't be holding them past their service. However, if the Court feels that it would be a hardship on the jury, then the people would have to move at this time for a discharge of the jury.

The Court: Are you so moving?

Mr. Turner: Well, I would first ask that the Court rule on my application to keep the jury.

The Court: Denied.

Mr. Turner: Then in that case, your Honor, the people would have to move for a discharge of the jury.

The Court: All right, that motion is granted. The Court is basing its ruling on the case f the matter of Roy Bland (phonetic) and also the matter of William Maury (phonetic), which is decided in 20 New York 2nd, page 552.

All right, bring in the jury. Discharge them."

Respondent's counsel, without elaboration, noted an exception to the ruling. The jurors were then returned to the central jury room.

Subsequently, on the following Monday, March 29, 1971, the prosecutor moved for trial.

The attorney for the co-defendant moved for a severance on the ground that respondent intended to call co-defendant as a witness, according to information then given by respondent's trial counsel. The motion was granted. Another panel was brought into the courtroom. In explaining that the voir dire would be conducted by him, the Court stated to the prospective jurors: "Now, the reason we're selecting in this manner and the Court is selecting, is that this has been instituted since January 3, 1971, and it's in an effort to attempt to clear calendar congestion."

Thereafter the second panel was discharged after the voir dire was partially completed, because of the presence of a juror on the second panel who stated he had been selected for the first jury which had been discharged, which statement and circumstance the trial judge considered as possibly prejudicial to respondent.

A new jury was impaneled and sworn. On April 1, 1970, the jury was unable to reach a verdict and a mistrial was declared.

On June 21, 1971, a new trial began. The jury found the respondent guilty as charged and he was sentenced on September 10, 1971. At the sentencing, respondent's trial counsel moved to set aside the verdict on the ground of former jeopardy. This motion was denied.

The judgment of conviction was affirmed without opinion by the New York Appellate Division, Second Department, on February 26, 1973. *People* v. *Mizell,* 41 AD2d 701 (2d Dept. 1973). On April 6, 1973, respondent's application for leave to appeal was denied by the Hon. Sol Wachtler, Judge of the New York Court of Appeals.

B. Legal Context of Respondent's Double Jeopardy Claim Prior to Application for Federal Habeas Corpus Relief

In 1931 this Court held, in *Palko* v. *Connecticut,* 302 U.S. 319, that the protection of the Fifth Amendment of the Federal Constitution against putting an individual twice in jeopardy for the same offense was not applicable through the Due Process Clause of the Fourteenth Amendment to the state of Connecticut, where a state statute permitted appeal by the state after a conviction, and retrial of the defendant for a crime in a higher degree than that for which he was originally convicted.

In 1963, this Court held in *Downum* v. *United States,* 372 U.S. 734, that in a federal prosecution, where a jury had been sworn and the prosecutor, whose negligence in failing to subpoena witnesses had caused their unavailability, requested a discharge of the jury before the first witness was sworn, a plea of double jeopardy under the Fifth Amendment would be sustained upon the impanelling of the second jury.

In March 1967, this Court held in *Klopfer* v. *North Carolina,* 386 U.S. 213, that a defendant's right to a speedy trial is fundamental and is imposed upon the States by the Due Process Clause of the Fourteenth Amendment.

In November 1967, the New York Court of Appeals, three judges dissenting, held in *Matter of Bland,* 20 N Y 2d 552, 232 N E 2d 633, that the "time honored" rule then extant in New York that jeopardy attached in jury trials when a witness was sworn, was not incompatible with the federal rule or federal constitutional standards. No appeal to this Court from that decision was undertaken.

In 1969, this Court held in *Benton* v. *Maryland,* 395 U.S. 784, that where a defendant in a state trial was acquitted after trial of a crime charged, but convicted of another crime jointly charged, and the conviction was reversed, the guarantee against double jeopardy prevented his retrial on

the crime for which he was acquitted. *Palko* v. *Connecticut, supra* was overruled. This Court held that the concept of double jeopardy was fundamental and that the Fifth Amendment prohibition was applicable to the States through the Fourteenth Amendment.

In 1970, the New York Legislature incorporated the rule of *Matter of Bland, supra* into New York Criminal Procedure Law §§ 40.20(1), 40.30(1), effective September 1, 1971.

In January 1973, nearly two years after the original jury was discharged in the instant case, this Court stated in *Robinson* v. *Neil,* 409 U.S. 505, 508:

> ". . . Although the Court has not handed down a fully reasoned opinion on the retroactivity of *Benton* v. *Maryland,* it has indicated that it is retroactive without examination of the Linkletter [*Linkletter* v. *Walker,* 381 U.S. 618 (1965)] criteria."

In February 1973, this Court stated in *Illinois* v. *Somerville,* 410 U.S. 458, 469, that federal courts should not be too quick to interfere with a state trial judge's "rational determination designed to implement a legitimate state policy" where there is "no suggestion" that such determination could be "manipulated . . . to prejudice the defendant."

In 1974, the New York Legislature amended N.Y. Criminal Procedure Law § 40.30(1) to provide that in a jury trial jeopardy attaches when a jury has been impanelled and sworn.

C. Opinion of the United States District Court for the Eastern District of New York on Respondent's Federal Habeas Corpus Claim

On December 30, 1977, the United States District Court for the Eastern District of New York (Nickerson, J.), rendered an opinion in the instant proceeding granting

the writ of habeas corpus—the only relief sought by respondent in his petition filed in 1976—although respondent had been released from state custody prior to the date of said opinion. See *Mizell* v. *Attorney General*, 442 F. Supp. 868 (E.D.N.Y. 1977), Appendix B. The District Court held that the federal rule, that jeopardy attaches once the jury is sworn, was *ipso facto* applicable to the 1971 proceedings in issue by virtue of *Benton* v. *Maryland, supra.* The District Court further held that there was no manifest necessity for the discharge of the jury under the circumstances of this case.

D. Decisions of this Court Subsequent to the Opinion of the United States District Court Below

In February, 1978 this Court stated in *Arizona* v. *Washington*, 434 U.S. 497, 506, that the phrase "manifest necessity" does "not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge."

On June 14, 1978, this Court rendered its opinion in *Crist* v. *Bretz*, 437 U.S. 28 (1978). In striking down the Montana statute, which, as the New York law in 1971, held to the rule that jeopardy attached when a witness was sworn in criminal jury trials, this Court said:

> "Today we explicitly hold . . . The federal rule that jeopardy attaches when the jury is empanelled and sworn is an integral part of the constitutional guarantee against double jeopardy." (437 U.S. 28, 38).

Except as to the appellee therein, this Court did not specifically address the issue of the retroactivity of its holding to state convictions in criminal jury trials which had theretofore become final, and which were obtained after a sworn jury had been dismissed, but before a witness was sworn. Further, appellant therein specifically waived any challenge to the Ninth Circuit's ruling that there was no manifest necessity for the discharge of the jury, and this Court expressed no view on the correctness

of that ruling (437 U.S. 28, 31, fn. 5). This Court further stated that the rule when jeopardy attaches was an "aspect" of the constitutional guarantee against double jeopardy (437 U.S. 28, 29).

E. Opinion Below of the United States Court of Appeals for the Second Circuit

The United States Court of Appeals for the Second Circuit held that but for the mootness of the relief granted by the judgment as prayed for in the petition—a circumstance created by respondent's release from custody—it would have affirmed the holding of the District Court that "the federal rule set forth in Downum had been made applicable to the states in Benton". The Court below concluded that *Crist* v. *Bretz* "rejected as unconstitutional the Montana rule which like the former New York law, provided that jeopardy attaches only after a witness is sworn". It relied on *Robinson* v. *Neil*, 409 U.S. 505 (1973), which construed *Benton* v. *Maryland, supra,* in holding *Crist* v. *Bretz* fully retroactive, and in further holding the criteria regarding retroactivity set forth in *Linkletter* v. *Walker*, 381 U.S. 613 (1965) and *Desist* v. *United States*, 394 U.S. 244, 249 (1969), inapplicable to the case at bar.

The Court below dismissed the State's claim that congested calendar conditions and the right of other accuseds to the services of the discharged jurors made it manifestly necessary for the trial judge to discharge them in the furtherance of a legitimate state policy, stating:

> "The only reason given by the court for failure to grant a continuance was the convenience of the jury."

Finally, the Court of Appeals concluded that the judgment of the District Court should be vacated and remanded for consideration of a new judgment affording appropriate relief:

> ". . . at the time of the district court's order, Mizell was

no longer in custody and his prayer for relief of release was therefore moot. Were Parker v. Ellis, 362 U.S. 574 (1960), still good law, we would be required to dismiss this appeal as moot. Parker v. Ellis, however, is not good law, having been overruled by Carafas v. LaVallee, 391 U.S. 234 (1968). Since Mizell was in state custody at the time he filed his application in the district court (November 29, 1976), federal jurisdiction 'is not defeated by the release of the petitioner prior to completion of proceedings . . .' Carafas v. LaVallee, 391 U.S. at 238. The basis for the Carafas holding is that:

> the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that '[t]he court shall . . . dispose of the matter as law and justice require.' (28 U.S.C. § 2243, 391 U.S. at 239.

The Supreme Court then notes that amendments in 1966 to the habeas corpus statutes (for example, 28 U.S.C. § 2244[b]) 'seem specifically to contemplate the possibility of relief other than immediate release from physical custody . . .' 391 U.S. at 239."

Noting that the precedents were few, the Court of Appeals left to the District Court the fashioning of appropriate relief and suggested:

> "the possibility of a declaration that the September 10, 1971 conviction is void and of an order to the respondent Attorney General to apply in the New York courts for a vacatur of the conviction and for an order expunging it and all references to it from the records."

Judge Friendly, concurring "dubitante", opined, in the context of the permissable limit of interference by federal

courts in the administration of justice by the states:

> ". . . I believe we have here gone to the very verge and perhaps beyond it."

POINT I

The determination below that *Crist* v. *Bretz* is fully retroactive deals a grave blow to fundamental principles of Federalism; to the concurrent jurisdiction of state courts of last resort to decide federal constitutional questions in absence of a clear decision of this Court, and to the right of state trial judges to rely on such precedent.

A

As underlined by the opinion of Judge Friendly, concurring *dubitante,* the issues in this case are truly of wide import under the Constitution with regard to fundamental principles of Federalism and merit the grant of certiorari.

Until *Crist* v. *Bretz,* 437 U.S. 28 (1978) was decided, the states were not on notice that the federal rule regarding when jeopardy attaches, expounded in *Downum* v. *United States,* 372 U.S. 734 (1963), was a part of the constitutional guarantee against double jeopardy; nor were the states on notice that the *Downum* rule was prophylactic. In holding *Crist* fully retroactive as a matter of first impression, the Court below exhibited a cavalier disregard for the doctrines of concurrent jurisdiction and *stare decisis.*

In *Robinson* v. *Neil,* 409 U.S. 505, 508 (1973), this Court acknowledged it had "not handed down a fully reasoned opinion on the retroactivity of *Benton* v. *Maryland*". Thus, this Court's prior decisions in *Downum* v. *United States, supra* and *Benton* v. *Maryland,* 395 U.S. 784 (1969), could not possibly be sufficient to put the state trial judge on notice that the federal rule regarding when jeopardy attaches was applicable to the State of New York in 1971.

In his concurring opinion below, Judge Friendly aptly points out that the trial judge cannot be faulted for lacking the prescience in 1971 to conclude that *Benton* v. *Maryland* made *Downum* v. *United States* applicable to the states when this conclusion was possible only in the "luminous hindsight of *Crist* v. *Bretz* . . . and *Robinson* v. *Neil.*" No state trial judge and no state court should be subjected, under these circumstances, to the inequitable imposition of the "sporting theory of justice" to retrospectively void a state conviction which has long since become final, and which is otherwise unassailable.

Robinson v. *Neil* was decided two years after the state trial judge herein discharged the sworn jury. *Crist* v. *Bretz* was decided seven years after the discharge of the jury. Clearly, therefore, the lower state trial courts were entitled to act on the basis of the rule announced by the highest court of the State of New York in *Matter of Bland* v. *Supreme Court,* 20 N Y 2d 552, 232 N.E. 2d 633 (1967), even if that rule was less stringent than the related federal rule. See *Johnson* v. *Louisiana,* 406 U.S. 356 (1972), where a state law permitting less than unanimous jury verdicts in criminal cases was held not violative of federal Due Process standards, and *Williams* v. *Florida,* 399 U.S. 78 (1970), where trial by a jury of less than twelve in state criminal cases was held not violative of the Sixth Amendment.

The holding of the New York Court of Appeals in *Matter of Bland, supra,* was made under principles of concurrent jurisdiction permitting state courts of last resort to rule on federal constitutional questions where necessary, in absence of a contrary ruling of this Court. See *Claflin* v. *Houseman,* 93 U.S. 130, 136-140 (1876); The Federalist No. 82 (A. Hamilton); compare *Franks* v. *Delaware,* —— U.S. ——, 98 S. Ct. 2674, 2680 (1978). The reliance on *Matter of Bland, supra,* by the state trial judge was made under principles of *stare decisis,* permitting lower state

court judges to rely on opinions of state courts of last resort. *Commission of Investigation* v. *Lombardozi,* 7 A D 2d 48, 180 N.Y. Supp. 2d 701 (N.Y.A.D. 1st Dept. 1958), affd. 5 N Y 2d 1026, 158 N.E. 2d 250 (1959), mot. granted 6 N Y 2d 753, 159 N.E. 2d 201 (1959), mot. granted 6 N Y 2d 878, 160 N.E. 2d 125 (1959), cert. den. 360 U.S. 930 (1959), app. dism. 361 U.S. 10 (1959).

In *United States* v. *Burr,* 8 U.S. 281, 4 Cranch 470 (1807), Mr. Chief Justice Marshall admonished that "an opinion which is to overrule all former precedents and establish a principle never before recognized should be expressed in plain and explicit terms" (8 U.S. at 290; 4 Cranch at 481). In light of this admonition, this Court, in "explicitly" holding in *Crist* v. *Bretz, supra,* that the federal rule as to when jeopardy attaches was an integral part of the constitutional guarantee against double jeopardy, and therefore prophylactic, made a tacit admission that the former precedent of the New York Court of Appeals in *Matter of Bland, supra,* was viable and controlling in 1971 in the absence, then, of a clear decision of this Court to the contrary, *United States* v. *Burr, supra; cf. United States* v. *White,* 401 U.S. 745, 754 (1971).

B

Although the impact of the decision below has the effect of retroactively voiding every state criminal conviction which had become final wherein the "Montana" rule was relied on by a state judge to discharge a sworn jury before a witness was sworn, the court below did not apply the test of the "impact upon the administration of justice", *Johnson* v. *New Jersey,* 384 U.S. 719, 728 (1966), or any of the other criteria set forth in *Linkletter* v. *Walker,* 381 U.S. 618 (1965) regarding retroactive application of "constitutional" rules of criminal procedure, in deciding whether *Crist* v. *Bretz* should be retroactively applied in the instant proceeding.

The reason for this was the language in *Robinson* v. *Neil, supra,* to the effect that *Benton* v. *Maryland* was entitled to retroactive application "without examination of the Linkletter criteria" (409 U.S. 505, 508). However, *Benton* v. *Maryland, supra, Robinson* v. *Neil, supra,* and the cases relied on in *Robinson* v. *Neil,* namely *North Carolina* v. *Pearce,* 395 U.S. 711 (1969), *Ashe* v. *Swenson,* 397 U. S. 436 (1970) and *Waller* v. *Florida,* 397 U.S. 387 (1970) were decided in the completely different and more traditional factual context of a retrial after a prior full trial, at which evidence was introduced and witnesses had testified, and resulted in a verdict and judgment of conviction or acquittal.

We respectfully submit that the precedential effect of *Robinson* v. *Neil, supra,* must yield to the impact of facts not foreseen by or encompassed in that decision; see FRANKFURTER, J., concurring in *Reid* v. *Covert,* 354 U.S. 1, 50-51 (1956).

Mr. Justice Harlan stated in his dissent in *Desist* v. *United States,* 394 U.S. 244 (1969):

> ". . . given the fundamental place of federalism in the traditional conception of constitutional adjudication, it could certainly be strongly argued that the lower courts could properly follow the traditional due process approach until the time this Court made it clear that a particular Bill of Rights guarantee had been incorporated." (394 U.S. 244, 267.)

Since this Court stated in *Crist* v. *Bretz* that the rule regarding when jeopardy attaches is an "aspect of the constitutional guarantee against being twice put in jeopardy" (437 U.S. 28, 29) and since this Court also stated in *Crist* that "Today we explicitly hold . . . the federal rule is an integral part of the constitutional guarantee . . ." (437 U.S. 28, 38), we submit that Mr. Justice Harlan's language

quoted above should be read to permit lower state courts to follow contrary precedent set by state courts of last resort, until such time as this Court makes it clear that the procedural aspect of the guarantee against double jeopardy regarding when jeopardy attaches has been incorporated. As this incorporation was by no means clear until *Crist* v. *Bretz,* the prophylactic rule therein established should not be retroactively applied. Compare *Michigan* v. *Payne,* 412 U.S. 47 (1973), which held that the resentencing aspect of *North Carolina* v. *Pearce, supra,* was prophylactic and under *Linkletter* analysis, should be applied prospectively only.

Stare Decisis is a keystone principle, absolutely fundamental to the very concept of the orderly administration of justice. See *Lemon* v. *Kurtzman,* 411 U.S. 192, 198-199 (1973). The dangerous precedent of the decision below contradicts this principle, and inequitably impedes the right of a state trial judge to rely on the viable precedent set by his superiors on federal constitutional questions. For the reasons stated above, we respectfully submit that certiorari must be granted on the question of the retroactivity of *Crist* v. *Bretz.*

POINT II

The failure of the Court below to recognize the manifest necessity of the state judge's discharge of the sworn jury in furtherance of the legitimate state policies of clearing calendar congestion and affording other accuseds a speedy trial creates a license for unwarranted interference by federal courts in the administration of criminal justice by the states.

The decision below ignores the dilemma faced by a front-line state trial judge confronted with congested calendar conditions in a busy criminal trial part, attempt-

ing to comply with the directives of his superiors and at the same time insure the constitutional rights of this respondent, and other accuseds.

Since the rendering of such landmark opinions of this Court as *Mapp* v. *Ohio,* 367 U.S. 643 (1961), *Escobedo* v. *Illinois,* 378 U.S. 478 (1964); *United States* v. *Wade,* 388 U.S. 218 (1967), and *Chimel* v. *California,* 395 U.S. 752 (1969), the procedural rights of the criminally accused in state courts have been greatly expanded. This rapid expansion of the criminally accused has resulted in increasingly time consuming litigation in all criminal courts and has caused increasingly heavy calendar conditions. This congestion is nowhere more graphically demonstrated than in the Criminal Courts of the State of New York. By 1968, just three years before the instant case went to trial, New York City alone had a backlog of more than 520,000 non-traffic criminal cases. Friendly, *Is Innocence Irrelevant? Collateral Attack On Criminal Judgments* 38 U. Chi. L. Rev. 142, 149, fn. 27 (1970).

Moreover, as the instant case demonstrates, this expansion of the rights of the criminally accused often requires that state courts resolve conflicting constitutional principles such as the protection against double jeopardy and the right to a speedy trial. *Klopfer* v. *North Carolina, supra.* While we do not deny respondent's interest in retaining a chosen jury, other accuseds also had an interest in the availability of the fourteen jurors involved here. Holding these jurors, even for a day and a half as requested by the prosecutor, meant that even for that day and a half they were unavailable for use in other criminal trials.

The record in this case demonstrates that the trial judge was aware of this conflict, and attempted to exercise his discretion in a way which would best resolve it. In explaining that the voir dire would be conducted by him, the trial judge stated to the prospective jurors on the second panel: "Now, the reason we're selecting in this manner

and the Court is selecting, is that this has been instituted since January 3, 1971, and it's in an effort to attempt to clear calendar congestion." It is thus obvious that, at the time of the discharge of the first jury herein the implementation of the state policy of clearing calendar congestion was a major consideration taken into account by the trial judge, as was the state policy, implemented pursuant to *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967), of insuring a speedy trial to all persons accused of crimes. See N.Y. Crim. Proc. L. §§ 30.20, 170.30(e); 210.20(g); Denzer, *Practise Commentary to N.Y. Crim. Proc. Law § 30.20,* 11 A McKinneys Crim. Proc. L., 77 (1971).

The case at bar is unique in that there is no evidence of prosecutorial negligence. On the contrary, the prosecutor acted with diligence to insure the presence of the witness. In *Illinois* v. *Somerville,* 410 U.S. 458 (1973), this Court held manifestly necessary the trial court's discretionary discharge of a jury in order to permit the amendment of a jurisdictionally defective indictment. Surely, the presence of the prosecution witnesses is at least as important to the obtaining of a conviction, and is a sufficient basis for declaration of a mistrial when the prosecutor is in no way at fault for their failure to appear.

Judge Friendly was deeply troubled by this situation:

> ". . . It differs from *Downum* v. *United States,* 372 U.S. 734 (1963), and *Cornero* v. *United States,* 48 F. 2d 69 (9 Cir. 1931), which was cited with approval in *Downum,* in that in those cases the prosecutor had been negligent (see *Downum,* 372 U.S. at 737, and Mr. Justice Clark's discussion of *Cornero,* 372 U.S. at 739 n.*), whereas here he did everything humanly possible to assure the presence of the witnesses short of actually having them in the courthouse before impaneling a jury, often a time consuming process in the New York courts, and holding the witnesses in custody—a course which no one could reasonably advocate. The prose-

> cutor initially sought a continuance; he asked for a discharge of the jury only when the court's refusal of this left him no alternative. Moreover, the court's refusal to grant a continuance was not solely or, as I read the record, even preponderantly for 'the convenience of the jury'; after discharging the jurors, the court directed them to report back to the central jury room, where they would be available for other important duties . . ."

Further

> ". . . defense counsel contributed nothing to enlighten him save for noting an unelaborated exception. If a double jeopardy claim had been clearly articulated, the judge might well have acted otherwise . . ."

An additional and ironic circumstance is that not only did the respondent's trial counsel fail at the critical time to attempt to demonstrate to the trial judge that his reliance on *Matter of Bland, supra,* was erroneous, but he also waited until the following Monday to announce that respondent intended to call his co-defendant as a witness. Had he done so on the prior Thursday and had the severance requested by co-defendant then been granted, there would have been no argument that the discharge of the sworn jury, theretofore addressed by each attorney for jointly indicted defendants, was not manifestly necessary. At the worst, the error, if any, would have been harmless.

This Court has indicated its reluctance to interfere with the rational determination of a state officer made to implement a legitimate state policy in a variety of contexts including the question of what constitutes manifest necessity for purposes of double jeopardy. See *Illinois* v. *Somerville, supra,* 410 U.S. at 469 (1973) and *Arizona* v. *Washington,* 434 U.S. 497, 506 (1978). See also *Younger* v. *Harris,* 401 U.S. 37 (1971); *Perez* v. *Ledesma,* 401 U.S. 82 (1971); *O'Shea* v. *Littleton,* 414 U.S. 488 (1974); *Lemon* v. *Kurtzman,* 411 U.S. 192, 208-209 (1973).

The doctrine of manifest necessity, excusing the premature termination of a criminal proceeding after jeopardy has attached, is peculiarly applicable in the factual situation herein presented. The trial judge had to decide how to best accommodate two conflicting principles of constitutional dimension. He rationally and in good faith resolved the conflict, without the assistance of respondent's trial counsel who articulated no alternative. The failure of the court below to take into account the context of these circumstances in deciding that there was no manifest necessity for the jury's discharge, puts it in the position of retroactively passing judgment on the determinations of state judges in the course of administering justice in state courts.

The clear conflict of this interference with the reluctance of this Court to interfere with the state judicial process mandates the grant of certiorari on the question of manifest necessity.

POINT III

The relief suggested by the Court below of ordering the expungement of the conviction from state records is improper, where the respondent is no longer in state custody at the time of the judgment and the state officials who have charge of such records are not parties to the habeas proceeding.

In vacating the judgment and remanding the matter to the District Court for entry of an appropriate judgment after appropriate application by respondent, the Court of Appeals left to the District Court the determination of what relief should be granted. The Court of Appeals noted that there are few precedents, but that the basis for the holding of this Court in *Carafas* v. *La Vallee,* 391 U.S. 234

(1968), was that 28 U.S.C. § 2243 provided for relief "as law and justice require".

We submit that the order issuing on remand, declaring the conviction null and void and directing its expungement from state records, is improper since it is in effect, a mandamus order on state courts and state officials who were not parties to this proceeding.

In *In re Green,* 141 U.S. 325 (1891), this Court held that it could not issue a writ of mandamus to the judges of a state supreme court directing them to restore to office an attorney and counsellor whom that court disbarred and to vacate the order of disbarment. In *In re Blake,* 175 U.S. 114 (1899), this court noted, in referring to a state court, that "the writ of mandamus cannot be issued to compel a judicial tribunal to decide a matter within its discretion in a particular way", 175 U.S. at 117.

These views have been affirmed by recent decisions in various Circuits. In *Clark* v. *State of Washington,* 366 F. 2d 678 (9th Cir. 1966), an action was brought to set aside in federal court a state disbarment proceeding. The Ninth Circuit found that it was not possible for a federal court to restore the plaintiff's name to the state list of active bar members because "the federal courts are without power to issue writs of mandamus to direct state courts or their judicial officers in the performance of their duties." 366 F. 2d at 681. See, also *Gately* v. *Sutton,* 310 F. 2d 107 (10th Cir. 1962) (disbarment proceedings); *Lamar* v. *118th Judicial District Court of Texas,* 440 F. 2d 383 (5th Cir. 1971) (order directing state court to act on pending state *habeas corpus* petition); *Haggard* v. *State of Tennessee,* 421 F. 2d 1384 (6th Cir. 1970) (mandamus action to compel state court to supply records relating to petitioner's conviction used as basis of imposition of sentence as habitual offender); *Biggs* v. *Ward,* 212 F. 2d 209 (7th Cir. 1954) (mandamus to compel judge of Superior Court to assign case to judge not elected in Cook County, Illinois); *Moye* v. *Clerk DeKalb County Superior Court,* 474 F. 2d

1275 (5th Cir. 1978) (prisoner of state seeking production of transcript and other documents).

See also *State of Oregon ex rel. Sherwood* v. *Gladden,* 240 F. 2d 910 (9th Cir. 1957) (federal court had no jurisdiction to issue a writ of mandamus otherwise than in aid of its appellate jurisdiction where state prisoner sought to compel state warden to permit him access to law books and other legal materials so that he could make a petition for *habeas corpus*), and *Brown* v. *Buchkoe,* 244 F. 2d 865 (6th Cir. 1957) (federal court could not order state court to furnish petitioner a transcript of the testimony at his trial without charge).

Compare, however, *Ex parte Young,* 209 U.S. 123; *Edelman* v. *Jordan,* 415 U.S. 651 (1974) and *Milliken* v. *Bradley,* 433 U.S. 267 (1977).

Further, the issue of appropriateness of remedy was raised for the first time in and by the Court of Appeals. Respondent has not yet amended his petition or otherwise sought or specified "appropriate" relief as directed by the Court below, 28 U.S.C. § 2242; Rule 2(d), Rules governing § 2254 cases, foll. 28 U.S.C. § 2254, and petitioner has not had the opportunity to plead or demonstrate that the equities favor the state and the interests of justice require retention of the record of petitioner's conviction, at least until this Court acts on the instant petition and otherwise resolves the issues herein presented. Compare *United States* v. *Schnitzer,* 567 F2d 536, 539 (2d Cir. 1977); N. Y. Crim. Proc. L. §§ 160.50, 160.60 (McKinney Supp. 1978). Petitioner has also not yet had the opportunity to argue, in the context of the remedy to be afforded, the failure of respondent to exhaust the state remedy provided by N. Y. Crim. Proc. L. §§ 160.50, 160.60, *supra.**

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* The relief provided under New York law is actually broader in scope than the remedy suggested by the Court below.

Thus, even if this Court finds in favor of respondent on Points I and II, *infra*, the nature of the relief granted by the District Court here raises important questions of the possible conflict of such relief with the Tenth and Eleventh Amendments and warrants at minimum a re-examination of *Carafas* v. *LaVallee, supra,* for the purpose of instructing lower federal courts in the proper remedies to be applied where a habeas petitioner is no longer in custody at the time of the rendering of a judgment in his favor.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York
January 22, 1979

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
By JOHN M. FARRAR
Assistant Attorney General
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of Counsel

APPENDIX A

Order.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 227—August Term 1978

(Argued September 27, 1978 Decided October 30, 1978.)

Docket No. 78-2059

JAMES MIZELL,
Petitioner-Appellee,

—against—

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK and ano.,
Respondents-Appellants.

Before:

FRIENDLY and MULLIGAN, *Circuit Judges,*
and WYATT, *District Judge.**

Appeal from an order entered in the United States District Court for the Eastern District of New York, Eugene H. Nickerson, *Judge,* granting a writ of habeas corpus following the conviction of James Mizell in New York Supreme Court, Kings County, for robbery, petty larceny, assault and possession of a dangerous weapon.

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* United States District Judge for the Southern District of New York, sitting by designation.

Appendix A.

Judgment vacated; remanded for consideration of new judgment for appropriate relief.

STEVEN LLOYD BARRETT, New York, New York (The Legal Aid Society, Federal Defender Services Unit, New York), *for Petitioner-Appellee.*

JOHN M. FARRAR, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, Robert Schonfeld, Assistant Attorney General, of Counsel), *for Respondents-Appellants.*

MULLIGAN, *Circuit Judge:*

James Mizell was convicted on September 10, 1971 in New York Supreme Court, Kings County, of robbery, petty larceny, assault and possession of a dangerous weapon. The record in the state court indicated that a jury of twelve plus two alternates was duly impaneled and sworn late in the afternoon of Wednesday, March 24, 1971. The state court judge gave the jury preliminary instructions and adjourned the case to the following morning. Mizell's counsel requested a *Wade* hearing to determine the admissibility of certain identification testimony. A hearing was held and the court found that the testimony was admissible. At this point (2:45 p.m. on Thursday, March 25) the Assistant District Attorney advised the court that two state witnesses who had been subpoenaed had failed to appear. One had gone to North Carolina because of a death in the family and the other had simply failed to make an appearance. The Assistant District Attorney requested a continuance until the following Monday.

Appendix A.

At that point the following colloquy took place:

> The Court: What am I going to do with that jury, Mr. Turner?
>
> Mr. Turner [Assistant District Attorney]: Your Honor, since the jurors are serving their first week this week, they would be serving next week as well. I don't think it would be a hardship on those jurors because we wouldn't be holding them past their service. However, if the Court feels that it would be a hardship on the jury, then the people would have to move at this time for a discharge of the jury.
>
> The Court: Are you so moving?
>
> Mr. Turner: Well, I would first ask that the Court rule on my application to keep the jury.
>
> The Court: Denied.
>
> Mr. Turner: Then in that case, your Honor, the people would have to move for a discharge of the jury.
>
> The Court: All right, that motion is granted. The Court is basing its ruling [on] the case of the matter of Roy Bland (phonetic) and also the matter of William Maury (phonetic), which is decided in 20 New York 2nd, Page 552. All right, bring in the jury. Discharge them.
>
> Mr. Albert [Petitioner's Counsel]: If your Honor please, I'd like to note my exception.
>
> The Court: You have an exception.

The case was called for trial again before a new jury on Tuesday, March 30, 1971 but a mistrial was subsequently declared when the jury failed to agree on a verdict. Mizell was eventually found guilty by another jury. At sentencing on September 10, 1971, Mizell's counsel moved to dismiss the indictment on the ground of double jeopardy. The motion was denied. On appeal to the Appellate Division of the Supreme Court, the State of New York, Second

Department, the judgment of conviction was affirmed without opinion on February 26, 1973. Leave to appeal to the Court of Appeals was denied on April 6, 1973. The State concedes that Mizell has fully exhausted his state remedies.

On November 29, 1976 Mizell filed a pro se application for a writ of habeas corpus in the United States District Court for the Eastern District of New York raising the issue that jeopardy had attached when the first jury was sworn in on March 24, 1971. The State contended that under the "New York rule" at the time of Mizell's three trials a defendant was not placed in jeopardy until a witness was sworn.[1]

In a memorandum and order filed on December 30, 1977[2] Hon. Eugene H. Nickerson, United States District Judge, Eastern District of New York, issued a writ of habeas

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[1] In 1970, this rule was incorporated by the New York State Legislature into N.Y. Crim. Proc. L. §§ 40.20(1), 40.30(1) (McKinney 1971); L. 1970, c. 996, § 1, and became effective on September 1, 1971. The statute was subsequently amended in 1974 to provide that in a jury trial jeopardy attaches when a jury has been empaneled and sworn. N.Y. Crim. Proc. L. § 40.30(1) McKinney Supp. 1977).

[2] The judgment granting the writ was entered on January 3, 1978 but respondents failed to file timely notice of appeal since despite the terms of the order filed on December 30, 1977 requiring the clerk to make copies of the order and to serve the parties, such service was not made. Under F.R.A.P. 4(a) the State's time to appeal expired on February 2, 1978, thirty days after the judgment was entered. F.R.A.P. 4(a) further provides that the State could have applied for an extension not to exceed thirty days from the expiration of the first thirty day period, to wit, until March 4, 1978. Respondents did not learn of the decision until it appeared in the advance sheets of the Federal Supplement dated March 6, 1978. A motion was made by the respondents pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure for an order vacating the judgment and directing entry of a new judgment granting the same relief. Judge Nickerson, finding that no service had apparently been made and that the re-

(footnote continued on following page)

corpus finding that under *Benton* v. *Maryland,* 395 U.S. 784 (1969), the states were bound to follow the rule of *Downum* v. *United States,* 372 U.S. 734 (1963) that jeopardy attaches as soon as a jury is sworn. He further found that the discharge of the jury was not required by "manifest necessity" or the "ends of public justice." *Illinois* v. *Somerville,* 410 U.S. 458, 468 (1973). We agree with the District Judge, but, since Mizell has been released from custody, we vacate the judgment appealed from and remand to the District Court for consideration of a new judgment containing an appropriate remedy.

(footnote continued from preceding page)

spondents had acted diligently and expeditiously, granted the motion, vacated the prior judgment and directed the entry of a new judgment granting the petition for the writ.

F.R. Civ. P. 77(d) states:

> Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

The district court's grant of relief under Rule 60(b)(6) in effect extends the time to appeal for more than the sixty days permitted by F.R.A.P. 4(a). Several circuits have established an exception under special circumstances to F.R. Civ. P. 77(d) and have upheld the vacating and re-entry of judgment under Rule 60(b)(6) where the sixty days to appeal under F.R.A.P. 4(a) has expired. These cases, however, have required a showing of more than the mere failure to notify the parties that judgment has been entered. Rather, the courts have insisted on a showing that counsel has diligently attempted to discharge the duty implict in Fed. R. Civ. P. 77(d) by making inquiries to discover the status of the case. *Buckeye Cellulose Corp.* v. *Braggs Electric Construction Co.,* 569 F.2d 1036 (8th Cir. 1978); *Fidelity and Deposit Co. of Maryland* v. *Usaform Hail Pool, Inc.,* 523 F.2d 744 (5th Cir. 1975), *cert. denied,* 425 U.S. 950 (1976); *In re Morrow,* 502 F.2d 520, 523 (5th Cir. 1974) ("To permit an appeal where there is failure to notify, without more, would be opposed to the clear wording and intent of Rule 77(d).").

(footnote continued on following page)

Appendix A.

In *Downum* v. *United States, supra,* it became established law that if a defendant were tried in a federal court, jeopardy would attach as soon as the jury was sworn. See *Illinois* v. *Somerville, supra; United States ex rel. Bland* v. *Nenna,* 282 F. Supp. 754 (S.D.N.Y.), aff'd, 393 F.2d 416 (2d Cir.), cert. denied, 392 U.S. 941 (1968). Under *Palko* v. *Connecticut,* 302 U.S. 319, 328 (1937) it was reasonably clear that federal double jeopardy standards did not apply to the states and that the Fourteenth Amendment did not protect the defendant against a double jeopardy claim unless he was subjected to a "hardship so acute and shocking that our polity [would] not endure it." However, in

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(footnote continued from preceding page)

In granting the Rule 60(b)(6) motion in the instant case, the district court relied on *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Inst.,* 500 F.2d 808 (D.C. Cir. 1974), which held that a trial court may vacate and re-enter a judgment under Rule 60(b) to allow a timely appeal upon a showing that neither party had actual notice of the entry of judgment, the winning party is not prejudiced by the appeal, and the losing party moves to vacate the judgment within a reasonable time after he learns of its entry. Id. at 810. We do not feel that this view would be accepted here. Although this circuit has not squarely addressed the issue (compare *International Controls Corp.* v. *Vesco,* 556 F.2d 665 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978)), prior decisions indicate that a Rule 60(b)(6) motion may not be granted absent some showing of diligent effort by counsel to ascertain the status of the case. In *Radack* v. *Norwegian America Line Agency, Inc.,* 318 F.2d 538, 542 (2d Cir. 1963), we stated:

> [L]ack of notice does not *ipso facto* mean that a judgment must, can or should be reopened . . . [Rule 60(b)(6)] cannot be used to circumvent the 1946 amendment to Rule 77(d) dealing with the effect of lack of notice on the running of the time for appeal.

See also *Wagner* v. *United States,* 316 F.2d 871 (2d Cir. 1963).

If Mizell had appealed the district court's order vacating his earlier judgment, we would be bound to reverse. However, since Mizell did not take such an appeal, we do no more than note the error here.

Appendix A.

Benton v. *Maryland, supra, Palko* was overruled and the double jeopardy clause was held to be so fundamental to our scheme of justice that "the same constitutional standards apply against both the State and Federal Governments." 395 U.S. at 795. In his opinion below Judge Nickerson rejected the State's contention that the difference between the federal and New York rules concerning when jeopardy attaches was merely technical or mechanical. Rather, Judge Nickerson found that "[t]he composition of a particular jury is crucial" to the defendant's interest, and that the double jeopardy clause protects the defendant's "valued right to have his trial completed by a particular tribunal." *Mizell* v. *Attorney General of the State of New York,* 442 F. Supp. 868, 871-2 (E.D.N.Y. 1977). We fully subscribe to the reasoning articulated in the district court and see no reason to repeat it here. In fact, after the filing of the opinion below, the Supreme Court in *Crist* v. *Bretz,* 98 S. Ct. 2156 (1978), rejected as unconstitutional the Montana rule which, like the former New York law, provided that jeopardy attaches only after a witness is sworn. The Court stated:

> Although it has thus long been established that jeopardy may attach in a criminal trial that ends inconclusively, the precise point at which jeopardy does attach in a jury trial might have been open to argument before this Court's decision in *Downum* v. *United States,* 372 U.S. 734, 83 S.Ct. 1033, 10 L.E.2d 100. There the Court held that the Double Jeopardy Clause prevented a second prosecution of a defendant whose first trial had ended just after the jury had been sworn and before any testimony had been taken. The Court thus necessarily pinpointed the stage in a jury trial that jeopardy attaches, and the *Downum* case has since been understood as explicit authority for the proposition that jeopardy attaches when the jury is empaneled

and sworn (citations and footnote omitted). 98 S.Ct. at 2160.

It is evident that the Supreme Court in *Crist* considered that the rule which was formulated by *Downum* in 1963 was made applicable to the states by *Benton* in 1969 and was not simply a mechanical or arbitrary rule of convenience.[3] Even if we were to accept the position of the State, that *Crist* has established new and overruling principles of law—an argument which we reject—it is our view that *Crist* should be fully applied retroactively.

The State relies on the three-pronged test of *Linkletter* v. *Walker*, 391 U.S. 618 (1965), as the appropriate test of retroactivity.[4] However, that contention ignores *Robinson* v. *Neil*, 409 U.S. 505 (1973), in which the Court stated:

> The prohibition against being placed in double jeopardy is likewise not readily susceptible of analysis under the *Linkletter* line of cases. . . .
>
> The guarantee against double jeopardy is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only.

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[3] *Downum* constitutionalized the rule that jeopardy attaches as soon as the jury is sworn by recognizing its source to be the double jeopardy clause of the Fifth Amendment. See, e.g., *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977); *Serfass* v. *United States*, 420 U.S. 377, 388 (1975); *Illinois* v *Somerville*, 410 U.S. 458, 467 (1973); id. at 471 (White, J., dissenting); *United States ex rel. Bland* v. *Nanna*, 282 F.Supp. 754 (S.D.N.Y.), aff'd, 393 F.2d 416 (2d Cir.), cert. denied, 392 U.S. 941 (1968).

[4] Since *Linkletter*, the Supreme Court has viewed the retroactivity of a new constitutional rule affecting criminal trials as a function of three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards." *Desist* v. *United States*, 394 U.S. 244, 249 (1969); *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965).

> While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial. A number of the constitutional rules applied prospectively only under the *Linkletter* cases were found not to affect the basic fairness of the earlier trial, but to have been directed instead to collateral purposes such as the deterrence of unlawful police conduct, *Mapp* v. *Ohio, supra* [367 U.S. 642 (1961)]. In *Waller* [397 U.S. 387 (1970)], however, the Court's ruling was squarely directed to the prevention of the second trial's taking place at all, even though it might have been conducted with a scrupulous regard for all of the constitutional procedural rights of the defendant. 409 U.S. at 508-09.

Crist makes clear that the rule that jeopardy attaches as soon as the jury is sworn is not simply an arbitrary exercise in line drawing but rather "serves as the lynchpin for all double jeopardy jurisprudence" and is "an integral part of the constitutional guarantee against double jeopardy." 98 S.Ct. at 2162.

In sum, we conclude that Judge Nickerson properly decided that the federal rule set forth in *Downum* had been made applicable to the states by *Benton*. In any event, we believe *Crist* should be applied retroactively.

The only question remaining is whether the discharge of the first jury was necessitated by manifest necessity. *Illinois* v. *Somerville, supra*, at 467-68. We again agree with the district court that no such circumstance existed here. The prosecutor asked for a continuance until Monday. There was no indication that either of the two witnesses would be unavailable by Monday. In fact, the request would indicate that the State could reasonably pre-

dict their attendance at that time. Moreover, the fact that on Monday the prosecutor moved for trial indicates that the witnesses were not irretrievably lost. The only reason given by the court for the failure to grant a continuance was the convenience of the jury. The jury, however, had not been sequestered and a continuance would not have required them to serve beyond their appointed term. This fact is of special significance since "[t]he discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances'. . . ." *Downum* v. *United States, supra,* at 736, quoting *United States* v. *Coolidge,* 25 Fed. Cas. 622, 623 (Cir. Ct., D. Mass. 1815). Under these circumstances neither the "ends of public justice" nor "manifest necessity" required a mistrial. A continuance should have been granted. See *Downum* v. *United States, supra; Cornero* v. *United States,* 48 F.2d 69, 71 (9th Cir. 1931).

While we are in agreement with the reasoning and the conclusion of the district court, the relief there granted was in the circumstances not appropriate. We are, accordingly, unable to affirm. We must vacate the judgment below and remand for consideration of a new judgment affording appropriate relief.

It developed at oral argument that Mizell had been released from custody at the expiration of his sentence. After argument, we were advised that the date of release was September 19, 1977, well before entry of the judgment below. There is some indication that this was made known to Judge Nickerson, but he was evidently not conscious of the fact when he made his decision. The award of relief was as follows: "The petition for a writ of habeas corpus is granted."

The award of relief was somewhat inexact since the writ of habeas corpus, historically and under the statute (28 U.S.C. § 2243), is simply a means of securing the petitioner's body for a hearing. After the hearing, if detention is found to be unlawful, the relief awarded is an order that petitioner be released. If detention is found to be lawful, the decision is to deny the relief requested in the petition. In either case, the writ itself issues (if at all) *before* the hearing; by the time of the decision, the function of the writ has been exhausted. Sokol, Federal Habeas Corpus 36-37 (2d ed. 1969).

The granting of the writ by the district court in the case at bar can only be interpreted as an order that Mizell be released. "As a sort of shorthand, lawyers and judges frequently use the expression 'granting the writ' as if it were equivalent to granting the relief requested." Sokol, *supra,* at 37. Mizell in his petition had asked for release from custody, and nothing more.

But at the time of the district court's order, Mizell was no longer in custody and his prayer for the relief of release was therefore moot. Were *Parker* v. *Ellis,* 362 U.S. 574 (1960), still good law, we would be required to dismiss this appeal as moot. *Parker* v. *Ellis,* however, is not good law, having been overruled by *Carafas* v. *LaVallee,* 391 U.S. 234 (1968). Since Mizell was in state custody at the time he filed his application in the district court (November 29, 1976), federal jurisdiction "is not defeated by the release of the petitioner prior to completion of proceedings . . ." *Carafas* v. *LaVallee,* 391 U.S. at 238. The basis for the *Carafas* holding is that:

> The statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that "[t]he court shall . . . dispose of the matter as law and justice require." 28 U.S.C. § 2243.

391 U.S. at 239. The Supreme Court then notes that amendments in 1966 to the habeas corpus statutes (for

example, 28 U.S.C. § 2244(b)) "seem specifically to contemplate the possibility of relief other than immediate release from physical custody." 391 U.S. at 239.

Mizell may wish to ask for such other relief. The conviction of September 10, 1971, may subject him to "disabilities or burdens" (*Fiswick* v. *United States,* 329 U.S. 211, 222 (1946)) and to "collateral consequences" (*Ginsberg* v. *New York,* 390 U.S. 629, 633-34 n.2 (1968)). The judgment below must be vacated so that Mizell may apply for such other relief. We leave it to the district court to determine what relief should be granted. We note the possibility of a declaration that the September 10, 1971 conviction is void and of an order to the respondent Attorney General to apply in the New York courts for a vacatur of the conviction and for an order expunging it and all references to it from the records. There are few precedents. The problem seems to have arisen in the following cases: *North Carolina* v. *Rice,* 404 U.S. 244 (1971), vacating and remanding 434 F.2d 297 (4th Cir. 1970); *Pinnell* v. *Cauthron,* 540 F.2d 938 (8th Cir. 1976); *Grandison* v. *Warden,* 423 F.Supp. 112 (D. Md. 1976); *Bentley* v. *Florida,* 285 F.Supp. 494 (S.D. Fla. 1968). See also *Sokol, supra,* at 78-80.

Judgment appealed from vacated. The cause is remanded to the district court for consideration of a new judgment affording appropriate relief.

FRIENDLY, *Circuit Judge,* concurring *dubitante*:

I concur on the basis that our holding is only that since the indications were that the two prosecution witnesses who were absent on Thursday would be available on Monday, the judge should have granted the continuance which the prosecutor requested and should not have discharged the jury. Even as so limited this seems to me an exceedingly close case. It differs from *Downum* v. *United States,*

372 U.S. 734 (1963), and *Cornero* v. *United States,* 48 F.2d 69 (9 Cir. 1931), which was cited with approval in *Downum,* in that in those cases the prosecutor had been negligent (see *Downum,* 372 U.S. at 737, and Mr. Justice Clark's discussion of *Cornero,* 372 U.S. at 739 n.*), whereas here he did everything humanly possible to assure the presence of the witnesses short of actually having them in the courthouse before impaneling a jury, often a time consuming process in the New York courts, and holding the witnesses in custody—a course which no one could reasonably advocate. The prosecutor initially sought a continuance; he asked for a discharge of the jury only when the court's refusal of this left him no alternative. Moreover, the court's refusal to grant a continuance was not solely or, as I read the record, even preponderantly for "the convenience of the jury"; after discharging the jurors, the court directed them to report back to the central jury room, where they would be available for other important duties. Furthermore, while in the luminous hindsight of *Crist* v. *Bretz,* 98 S. Ct. 2156 (1978), and *Robinson* v. *Neil,* 409 U.S. 505 (1973), we now know that the New York rule with respect to the attachment of jeopardy had been displaced by the combined working of *Downum* and *Benton* v. *Maryland,* 395 U.S. 784 (1969), the busy state trial judge can hardly be faulted for lacking such prescience, especially when defense counsel contributed nothing to enlighten him save for noting an unelaborated exception. If a double jeopardy claim had been clearly articulated, the judge might well have acted otherwise. The same Court that decided the cases cited by my brother Mulligan has warned federal courts against being too quick to interfere with a state trial judge's "rational determination designed to implement a legitimate state policy" when there is "no suggestion that the implementation of that policy" by declaration of a mistrial "could be manipulated so as to

prejudice defendant," *Illinois* v. *Somerville,* 410 U.S. 458, 469 (1973), and has instructed that the words "manifest necessity" "do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge", *Arizona* v. *Washington,* 434 U.S. 497, 506 (1978), see also *id.* at 516 fn. 35. The especially drastic characteristic of a double jeopardy determination in a case like this, namely, that the defendant is entitled not simply to a new trial but to be relieved of any, requires an appellate court to proceed with caution, particularly when, as here, there is no suggestion of prosecutorial or judicial abuse. I suspect my brothers might feel differently about this case if Mizell were serving the first year of a life sentence for murder rather than being at liberty after having completed his sentence; yet in strict theory the test should be the same. In short I believe we have here gone to the very verge and perhaps beyond it.

APPENDIX B

Opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76 C 2161

JAMES MIZELL,

Petitioner,

v.

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK and The Warden, Brooklyn House of Detention,

Respondents.

James Mizell, pro. se.

Louis J. Lefkowitz, Atty. Gen., New York City (Robert S. Hammer and John M. Farrar, New York City, of counsel), for respondents.

MEMORANDUM AND ORDER

NICKERSON, District Judge.

Petitioner, convicted on September 10, 1971 in New York Supreme Court, Kings County, of robbery, petty larceny, assault, and possession of a dangerous weapon, has applied for a writ of habeas corpus, alleging that his conviction violated the double jeopardy clause of the Fifth Amendment, applicable "to the States through the Fourteenth Amendment." *Benton* v. *Maryland,* 395 U.S. 784, 794 (1969).

The transcripts of the state court proceedings against petitioner and another defendant reveal the following facts.

Late in the day on Wednesday, March 24, 1971, a jury of twelve plus two alternates was duly impaneled and sworn. After giving preliminary instructions the judge adjourned the case until the following morning. On that day petitioner's attorney requested a hearing to determine whether identification testimony by the complaining witness was admissible under *United States* v. *Wade,* 388 U.S. 218 (1967). A hearing was held, and the judge ruled that although previous identifications of the defendants were tainted, the identification made in court could be presented to the jury. The Assistant District Attorney then informed the court that two of the witnesses for the prosecution were not available—one had left for North Carolina because of a death in his family, the other had simply not appeared. Both witnesses had been subpoenaed, and apparently the Assistant District Attorney did not learn of their unavailability until after the jury had been sworn.

Because of the absence of the witnesses the Assistant District Attorney requested a continuance until Monday, March 29. The following colloquy then ensued:

> "The Court: What im I going to do with that jury, Mr. Turner?
>
> Mr. Turner [Assistant District Attorney]: Your Honor, since the jurors are serving their first week this week, they would be serving next week as well. I don't think it would be a hardship on those jurors because we wouldn't be holding them past their service. However, if the Court feels that it would be a hardship on the jury, then the people would have to move at this time for a discharge of the jury.
>
> The Court: Are you so moving?
>
> Mr. Turner: Well, I would first ask that the Court rule on my application to keep the jury.
>
> The Court: Denied.
>
> Mr. Turner: Then in that case, your Honor, the people would have to move for a discharge of the jury.
>
> The Court: All right, that motion is granted. The

> Court is basing its ruling the case of the matter of Roy Bland (phonetic) and also the matter of William Maury (phonetic), which is decided in 20 New York 2nd, Page 552. All right, bring in the jury. Discharge them.".

After the atorneys for both defendants noted their exception, the judge discharged the jury. The case was called for trial again on Tuesday, March 30, 1971. The new jury heard evidence for two days and began its deliberations around noon on April 1. At 9:35 that evening, the jury informed the judge, for the second time, that it was deadlocked. The judge thereupon declared a second mistrial. A third trial of petitioner, before a third jury, began on June 21, 1971, and on this occasion he was found guilty.

The Fifth Amendment to the Constitution provides, in relevant part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Petitioner contends that under this clause, made applicable to the State through the Fourteenth Amendment, further proceedings against him were barred after the discharge of the first jury. He so contended in the State Court and on appeal to Appellate Division, Second Department, which affirmed without opinion. The Court of Appeals denied leave to appeal. Respondents acknowledge that petitioner raised the double jeopardy issue in his state appeals. Petitioner having exhausted his state remedies, this court may hear his claim.

I

[1] When petitioner was tried in 1971, the New York Criminal Procedure Law as it then stood provided that:

> 'A person may not be twice prosecuted for the same offense.

> "[A] person 'is prosecuted' for an offense . . . when he is charged therewith by an accusatory instrument filed in a court of this state . . . and when the action . . . [p]roceeds to the trial stage *and a witness is sworn.*" (McKinney's N. Y. Criminal Procedure Law §§ 40.20(1), 40.30(1); L. 1970, c. 996 § 1) (emphasis supplied).

Those provisions simply codified the rule adopted by the New York Court of Appeals in *Bland* v. *Supreme Court, County of New York,* 20 N.Y.2d 552 (1967), that jeopardy attaches only after a witness has been sworn. In the present case, since the court discharged the jury before a witness had been sworn, the court held petitioner had not been "prosecuted" and his retrial was not barred.

It seems clear that had the proceedings occurred in a Federal court petitioner would prevail. In *Downum* v. v. *United States,* 372 U.S. 734, 736 (1963), the Supreme Court held that discretion to discharge a sworn jury over a defendant's objection and before verdict is to be exercised "only in very extraordinary and striking circumstances" and that the fact that a key witness, who had not been subpoenaed, was absent did not justify discharge of the jury. The *Downum* case established that under the double jeopardy clause of the Fifth Amendment a defendant is placed in jeopardy, that is, jeopardy "attaches", as soon as a jury is sworn. See *Illinois* v. *Somerville,* 410 U.S. 458 (1973); *United States* v. *Jorn,* 400 U.S. 470 (1971); *United States ex rel. Bland* v. *Nenna,* 282 F.Supp. 754 (S.D.N.Y. 1968) (Frankel, J.), aff'd 393 F.2d 416 (2d Cir. 1968), cert. den. 392 U.S. 941 (1968).

This petition presents as the initial question whether the New York statutory rule in effect in 1971, that jeopardy does not attach until a witness is sworn,[1] is consistent with

[1] New York amended § 40.30 of the Criminal Procedure Law in 1974 to provide that a person "is prosecuted" when the case "proceeds to the trial stage and a jury has been empaneled and sworn." L.1974, c. 80, § 1.

the double jeopardy clause of the Fifth Amendment made applicable to the States by the Fourteenth Amendment.

Prior to the Supreme Court's decision in *Benton* v. *Maryland, supra,* 395 U.S. 784 (1969), the double jeopardy clause of the Fifth Amendment had not been thought to be incorporated in terms into the due process clause of the Fourteenth Amendment. In *Palko* v. *Connecticut,* 302 U.S. 319 (1937), the Court had held that Federal double jeopardy standards were not applicable against the States and that the Fourteenth Amendment did not protect the defendant against double jeopardy unless he were subjected to "a hardship so acute and shocking that our polity will not endure it." 302 U.S. at 328.

Measured by the standard of the *Palko* decision, what took place in this case could hardly be thought to have violated the Fourteenth Amendment. Palko, though indicted for first degree murder, had been convicted of murder in the second degree after a jury trial and sentenced to life imprisonment. The state appealed, a reversal was obtained, and Palko was convicted after a second jury trial of first degree murder and sentenced to death. If that was not a result sufficiently "acute and shocking" to be deemed prohibited by the due process clause, then surely the discharge of a first jury and a subsequent trial and conviction would not be improper. The New York Court of Appeals in *Bland* v. *Supreme Court, County of New York, supra,* and Judge Marvin Frankel in *United States ex rel. Bland* v. *Nenna, supra,* so held prior to *Benton* v. *Maryland, supra.* In fact the majority in the New York Court of Appeals was of the opinion that "it makes little difference" whether the Federal rule or the then New York rule applied. 20 N.Y.2d at 555.

But thereafter *Benton* v. *Maryland, supra,* changed the standards applicable to the States, decided that the double jeopardy clause was "fundamental to the American scheme of justice", and held that "the same constitutional stand-

ards apply against both the State and Federal Governments", 395 U.S. at 795. The Court said that a state conviction "must be judged, not by the watered-down standard enunciated in *Palko,* but under this Court's interpretations of the Fifth Amendment double jeopardy provision." 395 U.S. at 796, 89 S.Ct. at 2063.

Since the *Benton* case it has been consistently either held or assumed that the Federal test of when jeopardy attaches is to be applied to State prosecution. See, e. g., *Illinois* v. *Somerville, supra,* at 467, 1066; *Bretz* v. *Crist,* 546 F.2d 1336 (9 Cir. 1976), app. pending sub nom. *Crist* v. *Cline,* 430 U.S. 982 (Docket No. 76-1200); *McNeal* v. *Hollowell,* 481 F.2d 1145, 1149 (5 Cir. 1973); *Smith* v. *State of Mississippi,* 478 F.2d 88 (5 Cir. 1973), cert. den. 414 U.S. 1113; *People* v. *Davis,* 79 Misc.2d 137 (Niagara County Sup.Ct. 1974).

The State argues that the *Benton* case "left open" the question of when jeopardy is to attach in the State courts and that the time when jeopardy attaches "does not aspire to the constitutional level, but is merely a mechanical or arbitrary 'cutoff point'." But to accept this argument would be to acquiesce in a reversion, at least in part, to "the watered-down standard enunciated in *Palko",* to use the words of the *Benton* opinion, and to reject the Supreme Court's "interpretations of the Fifth Amendment double jeopardy provision."

I do not agree that "it makes little difference" whether the New York or the Federal rule applies or that the difference is merely "technical", as the New York Court of Appeals said in *Bland* v. *Supreme Court, County of New York, supra,* or "mechanical", as the State argues. A rule which permits a duly sworn jury to be discharged on motion of the prosecution does not protect a defendant's "valued right to have his trial completed by a particular tribunal." *United States* v. *Jorn,* 400 U.S. 470, 484 (1971). At petitioner's first trial, that tribunal had been chosen,

and petitioner was prepared to have his guilt or innocence determined by the twelve individuals selected. The next day over his objection he was abruptly deprived of that right. Those twelve people were lost to him, and twelve others seated in their places.

The Supreme Court decisions make it clear that the double jeopardy clause protects a defendant's affirmative right to be tried by a particular jury as much as it protects a defendant against prosecutorial overreaching once the trial is well underway.

> "[T]he interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one . . . [T]he lack of demonstrable additional prejudice [will not] preclude the defendant's invocation of the double jeopardy bar in the absence of some important countervailing interest of proper judicial administration." *Illinois* v. *Somerville,* 410 U.S. 458, 471 (1973).

As any experienced trial lawyer knows, jurors are not fungible, and the juries are not interchangeable. If they were there would be no provision for peremptory challenges of jurors not dischargeable for cause and a criminal defendant would have no interest, "weighty" or otherwise, in a particular jury. But just as each individual is unique so is each jury, composed as it is of different individuals.

In formulating proposed *voir dire* questions, challenging jurors for cause, and exercising peremptory challenges, counsel in a criminal case focus on the individual candidates for service on the jury. And it is not surprising that veteran defense counsel believe that the outcome often depends on the jury selection process. I. Mendelsohn, *Defending Criminal Cases* 61 (1967).

Jurors do not discard their individuality upon entering the jury box, but use their "basic experience with causal

relationships and probabilities'' in serving as fact-finders. ''Note, Community Hostility and the Right to an Impartial Jury'', 60 *Colum.L.Rev.* 349, 349-50 (1960). Particular juries also differ as representatives of the community. The panels from which juries are selected must reflect a cross-section of the community, *Taylor* v. *Louisiana,* 419 U.S. 522, 526-531 (1975), and the number of jurors on a petit jury must be sufficiently large to provide a "fair possibility" for obtaining such a cross-section. *Williams* v. *Florida,* 399 U.S. 78, 100 (1970). However, so long as no systematic exclusion of jurors has occurred, a criminal defendant has no right to a jury on which all sectors of the community are represented. Cf. *Apodaca* v. *Oregon,* 406 U.S. 404 (1972). A prosecutor may even go so far as to use peremptory challenges to exclude certain groups from a particular jury. *Swain* v. *Alabama,* 380 U.S. 202 (1965).

The composition of a particular jury is crucial, then, to the jury's role as fact-finder, moral voice, and community representative. The replacement of one jury by another may well determine the outcome of a trial[2] and, if beyond the scope of protections of the double jeopardy clause, can become a powerful weapon for prosecutorial abuse.

> ''If the prosecutor disliked the jury, or some of them . . . he might, at any time, attain his end, if, by solely alleging the want of proof after a jury were sworn, he could get rid of them.'' *People* v. *Barrett,* 2 Caines 304, 308-09 (1805).

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[2] It is not without significance that one of the juries which heard the case against petitioner failed to convict him. While petitioner can do no more than speculate, it is not wholly unreasonable for him to believe that the first jury might have acquitted him.

I hold that the double jeopardy clause guarantees to defendants in State criminal proceedings, no less than to defendants tried in the federal courts, the protection afforded by the rule that jeopardy attaches when a jury has been sworn.

II

[2] Because ''the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the double jeopardy clause bars retrial'' *Illinois* v. *Somerville, supra,* 410 U.S. at 467, I must consider whether the discharge of the jury "was required by 'manifest necessity' or the 'ends of public justice'." *Id.* at 408. The double jeopardy clause requires

> ''trial judges not to foreclose the defendant's option [to proceed before a particular tribunal] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings . . . [T]he judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.'' *United States* v. *Jorn,* 400 U.S. 470, 485-86 (1971).

Here, the trial court gave no consideration to defendant's interests whatsoever. The prosecutor informed the court of its inabiilty to proceed on a Thursday, and asked for a continuance until Monday. The court refused, for no reason other than an inconvenience to the jury sworn the previous evening. The court had not sequestered the jury, and a continuance would not have required the jurors to serve beyond their appointed term. A continuance

would have served as well as a discharge. Under the circumstances, the "ends of public justice" did not require a mistrial, and there plainly was no "manifest necessity" to discharge the jury.

The petition for a writ of habeas corpus is granted. So ordered.

Dated: Brooklyn, New York
December 29, 1977

EUGENE H. NICKERSON
Eugene H. Nickerson, U.S.D.J.

The Clerk shall make copies of this Order and serve them upon the parties.

APPENDIX C

Order.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

76 C 2161

JAMES MIZELL,

Plaintiff,

—against—

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, and ano.,

Defendants.

THE LEGAL AID SOCIETY
(Steven L. Barrett, Esq., of counsel)
for plaintiff

ROBERT ABRAMS, Attorney General of the State of New York
(John M. Farrar, Esq., of counsel)
for defendant

NICKERSON, District Judge

A mandate issued from the Court of Appeals on October 30, 1978 vacating the judgment entered on January 3, 1978 in the above captioned matter and remanding for appropriate relief.

For the reasons expressed in the prior memorandum and order of this court dated December 30, 1977, plaintiff's conviction in New York Supreme Court, Kings County, is

totally null and void. The conviction is vacated, and it and all references to it shall be expunged from petitioner's records.

Dated: Brooklyn, New York
January 3, 1979

Eugene H. Nickerson
EUGENE H. NICKERSON, U.S.D.J.